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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 785 68.

BRUCE A. MACKEY, *Petitioner*,

v.

SEARS, ROEBUCK AND CO., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 22-36; Pet. 10a-25a) and the order and judgment of that Court (R. 36-38) are not officially reported. The opinion of the Court of Appeals (Pet. 1a-9a) is reported at 237 F. 2d 869.

JURISDICTION.

The jurisdiction of the Court of Appeals to review the order of the District Court dismissing less than all of the claims set forth in the complaint was affirmed by this Court in 351 U.S. 427 (1956). The judgment of the Court of Appeals was entered on November 1, 1956. The petition for a writ of certiorari was filed on January 22, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

The complaint alleges that the respondent, a large retailer of general merchandise, injured the petitioner, a manufacturer and one-time supplier of the respondent, by (1) inducing a breach of contract, (2) imitating and selling goods represented as being of the petitioner's manufacture, and (3) lowering prices below cost and seeking a price reduction from the petitioner as its supplier, all in order to undermine petitioner's present and future businesses. The questions presented are—

1. Whether the conduct set forth states a claim for relief under Section 1 or Section 2 of the Sherman Act.

2. Whether the conduct charged states a claim for relief under Section 3 of the Robinson-Patman Act.

STATUTES INVOLVED.

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Secs. 1, 2; Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. Sec. 13a; and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15. These statutes are set forth in the Appendix, *infra*, pp. 1a - 2a.

STATEMENT.

The District Court dismissed charges of violations of the Sherman and Robinson-Patman Acts alleged in Count I of the complaint. This order of the District Court was affirmed unanimously by the Court of Appeals. The petition seeks a review of the affirmance.

The allegations of Count I may be summarized as follows:

The petitioner was the sole stockholder of General Metalcraft Company, a dissolved Illinois corporation, and is the sole stockholder of Time Saver Tools, Inc., an Illinois corporation. Both corporations were engaged in interstate commerce, Metalcraft as a manufacturer of lamps sold by it to retailers, and Time Saver as a manufacturer and seller of tools. (R. 3-4; pars. 1-6 of Count I).

The respondent, a New York corporation, is engaged in interstate commerce in the general merchandising retail business. It operates over 700 stores, and its net sales for the year ended January 31, 1953 were $2,932,337,701.00. (R. 4-5, pars. 7-9 of Count I).

It is alleged, in general terms only, that the respondent has sufficient economic power to ignore normal business considerations; it need not make a profit on all its purchases and sales. It has the power, by means of actual or threatened refusals to deal with some suppliers or by actual or threatened sales of goods at unreasonably low prices, substantially to destroy the business and property of small competitors and small suppliers. Sears has allegedly exercised its tremendous power "to discipline and punish" its suppliers, motivated by a specific intent to injure and destroy such suppliers. These acts have restrained trade "between such suppliers and Sears by causing them to feel that Sears will exercise its power against them in a similar way if they refuse to deal with Sears on terms dictated by Sears." (R. 5, 8-9, pars. 10, 22 of Count I). No competitor of Sears and, except for the petitioner, no supplier is named or otherwise referred to anywhere in the complaint.

Count I further sets forth allegations with respect to three episodes occurring during a period of several years, disconnected except as parts of a continuing attempt to destroy the petitioner's business, punish the petitioner,

and intimidate "others". (R. 5-6, par. 11 of Count I). In the spring of 1949, the respondent sought a price reduction on lamps with which the petitioner's company (Metalcraft) was then supplying it. After the petitioner refused to reduce lamp prices, the respondent sold lamps below cost in two cities where the petitioner had attempted to sell lamps to department stores. As a result, Metalcraft became insolvent and was dissolved in 1952. (R. 5-6, pars. 11-14 of Count I). In 1952, the respondent interfered with an arrangement between a third party and the petitioner, under which the petitioner was employed as a sales agent on commission. By threat of refusing to buy from the third party, the respondent induced the dismissal of the petitioner. (R. 7, pars. 15-16 of Count I). In 1952 the respondent copied certain tools and packaging of the respondent, advertised the sale of such tools at a price below cost, and sold the tools at unreasonably low prices; at some (unspecified) places in the United States the tools were sold at prices lower than at other (unspecified) places in the United States, in order to destroy the petitioner's business. (R. 7-8, pars. 17-21 of Count I).

On the respondent's motion, Count I was dismissed for failure to state an actionable claim under the statutes invoked and additionally for failure to allege concrete facts rather than general conclusions couched in statutory language. (R. 22-38) The Court of Appeals affirmed without dissent. (237 F. 2d 869, Pet. 1a-9a)

ARGUMENT.

I. The Dismissal of the Sherman Act Charges was Plainly Correct, and the Affirmance Presents No Issue Which is Significant, Substantial or Doubtful.

The decision of the Court of Appeals is correct and consistent with numerous other decisions involving construction of the Sherman Act, both of this Court and the lower federal courts. This decision is not in conflict with any judgment of any other court; at the same time, the issues presented are neither novel nor of particular interest, except to the parties.

With respect to Section 1 of the Sherman Act, the complaint fails even to suggest that there was a contract or combination involving the respondent in restraint of trade. Since violation of this section is asserted, the violation must necessarily take the form of "conspiracy". The complaint does not, however, provide conspirators, except perhaps Sears as a conspirator with itself. But the principle is thoroughly established that a single corporation cannot constitute a conspiracy. See, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola*, 200 F. 2d 911, 914 (C.A. 5th, 1952), cert. denied 345 U.S. 925 (1953), cited with approval by this Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 273 (C.A. 5th, 1954), cert. denied 348 U.S. 821 (1954); *Marion County Co-op Ass'n* v. *Carnation Co.*, 114 F. Supp. 58 (D.C. Ark. 1953), aff'd 214 F. 2d 557 (C.A. 8th, 1954); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C. Md. 1937). Each of the cases cited on page 5 of the petition to support the possibility of an "intra-corporate" conspiracy is readily distinguishable. In the *Yellow Cab Co.* case (332

U.S. 218), several individuals and corporations, as well as a combination in the form of merger, were involved. The *Kiefer-Stewart Co.* case (340 U.S. 211) also dealt with several defendants, rather than a single corporation, engaged in contracting in restraint of trade (resale price maintenance arrangements). *United States* v. *New York Great Atlantic and Pacific Tea Co.* (173 F. 2d 79 (C.A. 7th, 1949)) involved several corporate entities acting in illegal combination.

Under Section 1 of the Sherman Act, the restraint of trade charged, in order to be actionable, must have a substantial effect on sales and commerce in the commodity involved. The complaint, however, alleges little more than that Sears' power led or might lead to a psychological restraint of trade between Sears and its suppliers "by causing them (the suppliers) to feel that Sears will exercise its power against them in a similar way if they refuse to deal with Sears on terms dictated by Sears." (R. 5, par. 10 of Count I). There is no allegation of a *per se* violation of the law or of conduct which prejudiced "the public interests by unduly restricting competition or unduly obstructing the due course of trade." See *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911). There is no clue in the complaint to the specific commodity or commodities involved, the market area subject to restraint, the percentage thereof affected, and the scope of an alleged restraint otherwise. Rather the complaint describes the size of the respondent in terms of dollar sales of all merchandise throughout the world. It is, nevertheless, the area and scope of a particular alleged restraint which is significant. *Ruddy Brooks Clothes* v. *British & Foreign Marine Ins. Co.*, 195 F. 2d 86 (C.A. 7th, 1952), cert. denied 344 U.S. 816 (1952); *Louisiana Farmers Protective Union* v. *Great Atlantic & Pacific Tea Co.*, 131 F. 2d 419 (C.C.A. 8th,

1942); cf. *U. S.* v. *E. I. DuPont De Nemours & Co.*, 351 U.S. 377 (1956). The complaint, therefore, states no cause of action under Section 1.

Section 2 of the Sherman Act requires either (1) a combination or conspiracy to monopolize, or (2) an attempt to monopolize, or (3) successful monopolizing. The need for an actual combination or conspiracy is no less stringent under Section 2 than under Section 1, and is equally absent from the complaint. Furthermore, a conspiracy to monopolize requires the specific intent to monopolize, while the only intent alleged herein is that of destroying the petitioner's businesses. This alleged purpose of the respondent falls substantially short of a design to gain some kind of monopoly position. See *Swift & Co.* v. *United States*, 196 U.S. 375, 396-402 (1904); *United States* v. *General Electric Co.*, 80 F. Supp. 989, 1016 (D.C. N.Y. 1948).

Actual monopolizing under Section 2 requires that the offender have the power to exclude competitors or raise prices with respect to some identified commodity in a specified market. The degree of control exercised by a defendant in such a market must be overwhelming, as this Court has repeatedly emphasized. See, *e.g.*, United States v. *E. I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956); *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). The commodities or markets which the respondent controls are not set forth in the complaint. Instead, monopolizing in general is to be inferred simply from the respondent's size and the dollar volume of its sales, without more. But this is grossly inadequate.

The elements of an attempt to monopolize are also lacking altogether in the allegations. These are a specific intent to acquire a monopoly position coupled with a dangerous probability of success. See *Swift & Co.* v. *United*

States, 196 U.S. 375, 396-402 (1904); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 784-785, 814 (1946); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953).

Finally, under both sections of the Sherman Act a showing of injury to the public interest, rather than damage to the plaintiff, is indispensable. The right of an individual to bring an action for personal damages is simply incidental and subordinate. *Feddersen Motors* v. *Ward*, 180 F. 2d 519 (C.A. 10th, 1950); *Sholkin* v. *General Electric Co.*, 171 F. 2d 236 (C.A. 10th, 1948); *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp, 286, 296-302 (D.C. N.Y. 1954), aff'd 225 F. 2d 289 (C.A. 2d, 1955); *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C. Md. 1938). But the complaint stresses throughout the malice and misconduct of the respondent toward the petitioner on essentially a personal level; thus, Sears sought "to destroy each and every business owned, controlled or managed by Mackey and thereby to punish Mackey . . . and to deter others. . . ." (R. 6, par. 11 of Count I). No injury to the public interest is alleged or even intimated.

The petition seeks to establish the importance of asserted Sherman Act issues by piecing together an observation of the Court of Appeals with respect to the *Robinson-Patman* charges (see Pet. 6) and general dicta and commentary on the antitrust laws to be found in the early classic cases, such as the *Standard Oil*, *Appalachian Coals*, and *Northern Securities Co.* decisions, in order to support the vague assertion that "Group behavior which is unreasonably restrictive of competitive conditions is prohibited by the Sherman Act." (Pet. 1). Neither the specific statutory requirements for a cause of action nor the few factual allegations of the complaint receive much atten-

tion. While the Sherman Act is undoubtedly important, that importance does not extend to any case simply because a party invokes the Act.

II. Although There is a Conflict Between Courts of Appeal Concerning the Right to Bring a Private Treble Damage Action under Section 3 of the Robinson-Patman Act, the Decision Below Need Not Turn on This Issue and is Correct on Other Grounds.

If affirmance of the dismissal of Count I charges with respect to the Robinson-Patman Act depended exclusively on the reason given by the Court of Appeals below, the Court's decision, as well as its reasoning, would be in conflict with the action of the Court of Appeals for the Tenth Circuit in *Vance* v. *Safeway Stores* (239 F. 2d 144, Pet. 28a-32a). However, this is not the case. The factual situations underlying these apparently conflicting decisions are different in important respects and, in any event, the decision of the District Court below was soundly based on defects in the complaint other than the attempt of a private party to bring a civil action under the statute. *Cf. Spencer* v. *Sun Oil Co.*, 94 F. Supp. 408 (D.C. Conn. 1950). The ostensible conflict is one of opinions only. Accordingly, as in similar instances heretofore, this Court in its discretion may well deny certiorari review of the order below. See *e.g., Sanson Hosiery Mills* v. *N.L.R.B.*, 344 U.S. 863 (1952). *The Arlington, Inc.* v. *Edward Mayer*, 339 U.S. 965 (1950); *Langnes* v. *Green*, 282 U.S. 531, 535-539 (1931); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947); cf. *Ryerson* v. *United States*, 312 U.S. 405, 408 (1941). The petitioner "may not prevail unless there has been error in the result as well as error in the reasoning." *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 292 U.S. 290, 298 (1934).

The allegations of the complaint evidently seek to present a claim under clauses two and three of Section 3

of the Robinson-Patman Act. Both clauses require that an offender must have "the purpose of destroying competition, or eliminating a competitor". In the *Vance* case, *supra*, the defendant, a retail grocery chain, attempted to destroy its competitor, also a retail grocer. In the *Mackey* case, however, the petitioner is admittedly a manufacturer and supplier of goods who sells to retailers. No sales to customers at retail by the petitioner are alleged; the complaint specifically refers to sales to department stores only. (R. 4, 6, par. 4, 14 of Count I). Occasionally the complaint refers vaguely to "small competitors" of the respondent, but no allegation asserts that the petitioner was, in fact, a competitor of Sears. Rather, the petition contends that competition "among persons who supply products of the kind which Sears purchases for resale" was affected. (Pet. 4). It is also evident from the complaint that the respondent is not realistically charged with destroying all "competition" in general or everywhere. Consequently, the Act does not apply in its terms.

As another court has observed, on closely parallel facts, "The complaint does not allege that plaintiff is a competitor of defendant in the retail sale of Sunbeam products or in any other field of commercial endeavors; in fact, it indicates that the converse is true. Hence, even were it possible to view defendants' acts as a violation of the Robinson-Patman Act, there is no basis in the complaint for inferring that such violation caused damage to plaintiff." *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31, 43 (D.C. Calif. 1953). See also *Klein* v. *Lionel Corp.*, 138 F. Supp. 560 (D.C. Del. 1956); *Spencer* v. *Sun Oil Co.*, 94 F. Supp. 408 (D.C. Conn., 1950; *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 10 (C.C.A. 7th, 1949).

This section of the Act, a penal statute subject to strict construction, is hardly intended to protect all persons in an economic chain of manufacture, distribution, and sales under the heading of "competitors". Otherwise, a farmer, or his supplier of fertilizer, might equally complain of Safeway's conduct in the *Vance* case. Only a direct competitor is within the protection of the Act. *Cf. Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 1957 Trade Cases, par. 68,602 (D.C. Mass. Dec. 19, 1956).

Furthermore, as to the lamp charges, there are no factual allegations to support the position that lamps were sold at a lower price in one part of the United States than in another, or that lamps were sold at "unreasonably" low prices. The complaint simply recites that the respondents sold lamps at below-cost prices in the vicinity of petitioner's activities (making no allegation about sales elsewhere) and at still lower prices everywhere through its catalogs. (Pet. 4, R. 6, par. 14 of Count I). The allegations with respect to tools are even more vague; they offer no facts whatever as to times, places, sales, prices, or circumstances. Instead, they merely parrot the language of the statute. (See R. 8, par. 21 of Count I). The complaint falls far short of the requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure.

In a recent case, another court had occasion to deal with similar kinds of allegations charging a Section 3 Robinson-Patman violation, and, in dismissing the count, commented as follows:

> "The third count, which is based upon Section 3 * * * must also be dismissed. This count alleges that the defendants and each of them have in the past sold or contracted to sell, and now continue to sell or contract to sell, said 'Guide' at unreasonable prices, for the purpose of destroying competition by plaintiff, etc. * * * The Court feels that the allegations in the complaint are merely repetitions of the

language of the statute. They are conclusions of the pleader without facts pleaded to support them." *National Used Car Market Report* v. *National Automobile Dealers Ass'n*, 108 F. Supp. 692, 694-695 (D.C. D.C. 1951), aff'd as to this count in 200 F. 2d 359 (C.A.D.C. 1952); *cf. Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.*, 1956 Trade Cases, par. 68,285 (D.C. N.Y. Feb. 17, 1956).

Upon any of these grounds, independently of the right of a private party to sue, the decisions below on the Robinson-Patman issue were sound.

CONCLUSION.

The decision of the Court of Appeals with respect to the Sherman Act is correct; it is not in conflict with any other decision, and it does not present a significant question of law for the consideration of this Court. The decision concerning the Robinson-Patman Act is correct upon several grounds; an apparent conflict of decisions actually involves no more than a conflict of opinions. Therefore the petition for a writ of certiorari should be denied.[1]

Respectfully submitted,

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[1] Since this Court does not ordinarily seek out for review strange or interesting legal commentary, the respondent need hardly suggest that the Court resist the "unique opportunity * * * to determine the validity of the premise" of a random observation of a committee convened by the Attorney-General. (See Pet. 11).

APPENDIX.

Statutes Involved.

Section 1 of the Sherman Act (15 U.S.C. §1):

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

Section 2 of the Sherman Act (15 U.S.C. §2):

> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 3 of the Robinson-Patman Act (15 U. S. C. §13a):

> Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell,

goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Section 4 of the Clayton Act (15 U. S. C. §15):

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.